or delivery of satellite cable programming."[24] Although price is the principal medium for such discrimination, CableAmerica has experienced more subtle forms of discrimination that also are unlawful under the Cable Act. The Commission's regulations must address directly non-price forms of discrimination.

For example, certain vertically integrated programming vendors routinely audit cable operators' sales data to ensure that the vendors have been paid for all programming received by the customers. Although such an audit is disruptive to the operator, it is entirely appropriate if conducted fairly. But some vendors have conducted the audits in a discriminatory fashion, imposing them on smaller cable systems like CableAmerica with greater frequency than on larger operators. CableAmerica is unaware of any cost justification for this practice, particularly since CableAmerica has an unblemished record of making correct payments to the programming vendors.

In addition, some programming vendors (such as HBO) support cut-rate promotions by favored cable operators. In these promotions, the favored cable operator pays a lower price for programming on the promise that some or all of the rate reduction will be passed along to new customers. But the programmers often refuse to extend these same promotional opportunities to other, competitive video distributors. These promotions may last indefinitely, placing the competing cable operator at a significant competitive disadvantage. They can be an especially

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[24] § 628(c)(2)(B).

powerful advantage in a competitive market because they allow the favored distributor to build market share by attracting new customers from its competition, or from those not yet subscribing to cable.

In CableAmerica's experience, moreover, it is the larger, vertically integrated operator that gets the promotional benefit, not the smaller, independent operator. For example, for many months HBO offered a special promotional rate for new customers of the Comcast system in Huntsville; Cable Alabama, the later entrant in Huntsville, was not offered the same promotional opportunity. HBO's discriminatory promotion policy gave Comcast a significant advantage in attempting to woo both Cable Alabama customers and those Huntsville residents without cable service.

Although promotional programs are a legitimate part of any business, there is no economic or legal basis for limiting them to one cable operator in a given market. Certainly none of the potential considerations enumerated in section 628(c)(2)(B)(i)-(iv) apply. If a programmer truly wanted to increase customers for its service, it would extend promotional benefits to all customers in a community, not just to those served by favored programming distributors. Consequently, such practices are unlawful under Section 628(c) and must be covered by the Commission's regulations.

Paragraph 16. CableAmerica strongly supports a streamlined approach for resolving price discrimination complaints. Nevertheless, several aspects of the Commission's proposal in

Paragraph 16 repeat errors of statutory interpretation from earlier passages in the Notice, and are therefore inconsistent with the express language of the Cable Act.

First, for a price discrimination complaint under section 628(c)(2)(B), the Cable Act does not authorize the Commission to require proof that the discrimination prevented or significantly hindered the complainant from serving customers. That "harm" requirement applies only to violations of the general provisions of section 628(b). The specific anti-discrimination provision of section 628(c)(2)(B) contains no such "harm" requirement.[25] Under the statute, the only relevant inquiries are (1) whether a vertically integrated cable programming vendor has discriminated between or among cable operators in the pricing of any given programming service, and (2) whether that discrimination is warranted by the considerations listed in section 628(c)(2)(B)(i)-(iv). Those factors alone provide the standard for measuring any discrimination complaint under section 628(c)(2)(B).

Paragraph 17-18. CableAmerica agrees that the Commission may develop evidentiary presumptions to apply in the expedited administrative process, but those presumptions must remain faithful to the statute. Most important, in evaluating any section 628 claim of price discrimination, the Commission must presume that all such discrimination is suspect.

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[25] See supra comments at ¶ 10.

That presumption is mandated by the language of section 628 itself: discrimination in pricing is permitted only when based on "actual and reasonable differences" in production and delivery costs, or on "direct and legitimate economic benefits" attributable to the sale of programming to a distributor's customers.[26] These adjectives forcefully underscore that, to sustain any price discrimination, a programmer bears a substantial burden of demonstrating that a price differential is justified by hard economic data; the unsupported incantation of the factors listed in section 628(c)(2)(B)(i)-(iv) will not suffice.

So, for example, a programmer's argument that a price differential is warranted because of "reasonable requirements for creditworthiness" or "standards regarding character" must be proved in concrete terms based on real data. Merely pointing to the language of the Act cannot discharge the vendor's burden.

In particular, the Commission must require hard economic evidence to support any attempt to use "volume discounts" to justify discrimination under section 628(c)(2)(B)(iii). Congressional conferees expressly chose not to give programming vendors carte blanche to grant volume discounts to bigger cable operators. Earlier versions of the legislation included just such automatic permission for volume discounts.[27] The conferees changed those provisions to require that any such discounts be

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26 § 628(c)(2)(B)(ii), (iii) (emphasis added).

27 See S. Rep. No. 862, at 91-92.

soundly based on "direct and legitimate economic benefits reasonably attributable to the number of customers served by the distributor."[28] The adjectives "direct and legitimate" reinforce the strict proof requirements that apply to any attempt to justify volume discounts.

For this reason, CableAmerica is troubled by the request in paragraph 17 that commenters "address the extent to which we should consider such factors beyond volume discounts for distributing programming."[29] The Act and its legislative history make clear that the Commission may not automatically approve such volume discounts, or assign them a presumption of regularity. Instead, the Commission must insist on strict proof of the economic basis for such discounts.

We stress this point because we believe there is little economic basis for volume discounts in the sale of programming to cable operators. For example, the technical costs of providing the satellite signal to the head-end of an independent cable operator is the same as the cost of providing that signal to a head-end owned by a major MSO that owns 150 other cable systems.

Similarly, we doubt whether a programming vendor could point to any significant differences in transaction costs when dealing with independent cable operators rather than with huge MSOs. For example, billing by programmers ordinarily is done on a system-by-system basis. Although billing costs will vary according to

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[28] § 628(c)(2)(B)(iii).

[29] Notice ¶ 17.

the size of each local cable system, they will not vary on the basis of how many systems are owned by the MSO. Also, most programming vendors offer their programming services to independent cable operators on a take-it-or-leave-it basis, incurring no costs beyond the postage required to mail a contract. Absent any different costs for negotiation, there can be no significant differences in the cost of distributing programming to a small number of larger cable systems as opposed to large number of smaller ones.

Paragraphs 19-20. CableAmerica agrees with the Notice that standards should be developed for identifying those programming vendor pricing practices that are discriminatory in nature and not justified under the terms of the Cable Act. Clearly articulated standards will expedite the resolution of section 628 complaints. It also is reasonable to construct a system for this purpose that "relies on the marketplace" to aid in enforcement to the greatest extent possible.[30]

We question, however, the suggestion in Paragraph 20 that price differentials might be established that would be presumed "reasonable" under the Act, but beyond which price discrimination would have to be justified as provided in the Act.[31] We strongly doubt that such a system would be true to the congressional directive that any discrimination be based on "actual and

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[30] See Notice ¶ 12.

[31] See Notice ¶ 20.

reasonable" cost differences or "direct and legitimate" differences in benefits derived from the sale of programming. Moreover, to the extent the Commission believes that it may establish a level of price discrimination which may be tolerated for purposes of administrative convenience, that belief has no statutory basis. Nothing in the Cable Act suggests that Congress wanted to permit any amount of price discrimination that could not be justified under section 628(c)(2)(B)(i)-(iv).

The Notice's suggested tolerance for certain levels of price discrimination may flow from a concern that cable programming distributors will file complaints about trivial degrees of price discrimination.[32] Such a concern is misplaced. The market itself will sort out what level of price discrimination is de minimis and what level is significant. Because of the significant costs associated with a section 628 proceeding before the Commission, a video distributor will file a complaint only when the discriminatory practices impose financial consequences of a magnitude sufficient to warrant the expense of litigation. In any event, the Commission has statutory authority to penalize the filing of a frivolous complaint.[33] This combination of the cost of litigation and the penalty for frivolous actions should prevent petty complaints.

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[32] See Notice ¶ 20; see also Notice ¶ 11.

[33] Section 628(f)(3).

Paragraphs 21-24. After considering each of the alternatives proposed by the Commission, CableAmerica endorses a complaint procedure modeled on proceedings conducted under section 202 of the Communications Act. We propose modifying those procedures, however, to reflect the differences between the two types of proceedings.

As the Notice recognizes, a section 202 proceeding employs a three-step procedure to determine whether price differences for regulated services are permissible: (1) the FCC must decide whether the complaint involves "like" services, (2) if so, the Commission must determine whether there has been discrimination in prices, and (3) if both criteria are met, the agency must judge whether the discrimination is "just and reasonable."[34]

Section 628 proceedings rarely will present any real issue as to the "likeness" of a particular programming service, since a cable operator will most often be seeking to obtain the <u>same</u> programming or terms that a favored distributor receives. Nevertheless, to the extent "likeness" is an issue, it makes sense to resolve that issue at the outset. Similarly, the amount of any price discrimination also should be established at the initiation of the action. Then, as in section 202 proceedings, the inquiry should turn to the justification for the price discrimination. As in section 202 proceedings, this last inquiry

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[34] <u>MCI Telecommunications Corp. v. FCC</u>, 842 F.2d 1296, 1307 (D.C. Cir. 1988); <u>see also</u> <u>MCI Telecommunications Corp. v. FCC</u>, 917 F.2d 30, 39 (D.C. Cir. 1990); <u>Second Report</u> in Gen. Docket No. 89-88, 6 FCC Rcd 3312, 3318-21 (1991); <u>Report</u> in Gen. Docket No. 89-88, 5 FCC Rcd 523, 528 (1989).

should focus on whether any bona fide cost considerations justify the price discrimination.

Yet proceedings under section 628 are not like proceedings under section 202 in every respect, and certain procedural accommodations should be made. Most important is the question of burden of proof. For several reasons, CableAmerica strongly disagrees with the suggestion in paragraph 21 that the burden of proof should be on the programming distributor complainant on the second and third issues: the discrimination itself and its alleged justification.[35]

A cable operator will be at an enormous disadvantage in carrying the burden on these issues, particularly with respect to proving the negative proposition that there is no justification for the discrimination. Unlike proceedings under section 202, a complainant in a section 628 proceeding will have no proposed tariffs by which to determine cost structure of a competitor, or the possible bases on which that structure may be deemed reasonable.[36] Instead, a cable operator may have access only to information drawn from the competitor's advertising, comments made by customers, data contained in trade journals, or communications with the programmer itself.

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[35] See Notice ¶ 21 (suggesting that complainant would have burden on each of the three standards).

[36] See 47 U.S.C. § 201 (common carriers statutorily required to file proposed tariffs with Commission).

The programming vendor, of course, will possess all the information necessary to prove or disprove the discrimination and justification questions: the relevant pricing agreements, descriptions of the programming services involved, and data on the cost of acquiring, selling, and delivering programming or any economies of scale or other benefits from the sale of programming to a given distributor.

Consequently, the burden of proof in a section 628 proceeding must rest with the programming vendor to prove either (i) the absence of any discrimination, or (ii) that any such discrimination is justified under the Cable Act. Indeed, with respect to the latter issue, a cable operator might well not know which consideration listed in section 628(c)(2)(B)(i)-(iv), if any, the programming vendor would claim as justification for its pricing discrimination. If the cable operator had to carry the burden of proof, it would have to march through each and every consideration, disproving them one by one.

Placing the burden for justifying price discrimination on the programming vendor also is consistent with the procedure established for common carrier tariff determinations under the Communications Act. In proceedings before the Commission regarding "a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier."[37] This procedure also applies to court challenges to Commission

[37] 47 U.S.C. § 204.

determinations on tariffs.[38] It should be followed in section 628 proceedings as well.

Paragraph 25. There is no basis in the Cable Act for the FCC to approve anti-competitive practices by vertically integrated satellite cable programming vendors because non-vertically integrated vendors engage in similar anti-competitive conduct.[39] Indeed, perverse results would flow from the suggestion in the Notice that a vertically integrated programmer could justify a practice by showing that it is followed by non-integrated programmers.

First, what if the practices of the non-integrated programmers are themselves anti-competitive? Are those practices to be considered magically cleansed of illegality when employed by integrated programmers? Certainly not. In enacting section 628 of the Cable Act, Congress did not mean to approve any anti-competitive conduct in the cable industry. If a vertically integrated vendor could brush off a price discrimination complaint by showing that a non-integrated programming vendor was doing the same thing, competition in the industry would swiftly be reduced to the lowest common denominator, and the congressional policy in favor of competition would be thwarted.

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[38] See, e.g., ABC v. FCC, 663 F.2d 133, 139 (D.C. Cir. 1980) (once FCC shows like services and price discrimination, "the Commission shift[s] the burden to [the tariff proponent] to justify the discrimination"); see also MCI, 917 F.2d at 39 (same); MCI, 842 F.2d at 1307 (same).

[39] See supra comments at ¶ 8.

Second, we again strongly disagree that "harm" is any element of the Commission's inquiry into a discrimination complaint under section 628(c)(2)(B).[40] The Cable Act expressly dictates the specific justifications for price discrimination in a section 628 proceeding.[41] Those specific factors do not refer to any resulting "harm" that may otherwise be required in proceedings that arise under the broader language of section 628(b), and which do not directly involve discrimination.[42] The FCC has no authority to add such a requirement through this rulemaking.

Paragraph 27. The Commission would commit a grave error if it declined to apply its new anti-discrimination rules to existing programming contracts. Such a decision would lock in existing discriminatory practices followed by programming vendors, and would slow to an agonizing crawl the transition to a more competitive cable industry.

Confining the anti-discrimination rules to future contracts directly conflicts with congressional intent. In section 628(h), Congress specifically applied the ban on exclusive programming contracts to those agreements existing when the statute took

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40 _See supra_ comments at ¶ 10.

41 § 628(c)(2)(B)(i)-(iv).

42 As discussed above, the "harm" to be shown in a section 628(b) proceeding is limited to the specific adverse effects described there -- preventing or significantly hindering any multichannel video programming distributor from providing satellite cable programming.

effect, with a limited "grandfathering" of contracts signed before June 1, 1990.[43] Congress in section 628(c)(2)(B) applied the anti-discrimination rules to all contracts then in effect, with no "grandfather" exception whatever. This is conclusive evidence that Congress did not want the Commission to delay the competitive and consumer gains from this provision of the Act. In any event, absent any legislative statement to the contrary, a statute must be applied evenly on its effective date and is not confined to prospective effect.[44]

Paragraph 34. The prohibition on exclusive contracts in section 628(c)(2)(D), like the anti-discrimination provisions in section 628(c)(2)(B), does not authorize the Commission to require a finding of anti-competitive harm before an exclusive contract may be found to be unlawful. Nor would such a requirement make sense. An exclusive contract necessarily will prevent the excluded distributor from supplying the programming to its customers, which is the broad general standard in section 628(b). Imposing a "harm requirement" will only prolong and confuse the section 628 proceeding, contrary to Congress' intent,

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[43] Section § 628(h)(1). The Commission's proposal in ¶ 27 would be far more limiting since it proposes to make the anti-discrimination rules applicable starting with contracts formed at some time in the future. Lacking any basis in the statute, and in light of § 628(h)(1), this position is untenable.

[44] Thorpe v. Housing Authority, 393 U.S. 268, 281-83 (1969); U.S. v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109-10 (1801).

to the ultimate advantage of the largest vertically integrated MSOs.

Moreover, the Act makes clear that every exclusive programming contract is banned under the Act unless that contract meets the two exceptions provided for by Congress: either it predates June 1, 1990 or is found to be in the public interest. The standards for the public interest determination are set forth in the section 628(c)(4). No further exceptions are authorized.

Paragraph 35. In considering the factors relevant to whether an exclusive contract is in the public interest, the Commission may not go beyond the four items listed in section 628(c)(4). Had Congress intended to permit a broader inquiry of such matters, it would have granted such discretion to the Commission. Instead, Congress confined the public interest inquiry to the enumerated subjects.

The Notice also asks whether "there are other benefits to exclusivity that should be considered."[45] Although the statute answers the question in the negative, we are troubled by the one-sided nature of the inquiry. Why is the Commission also not concerned about other negative impacts of exclusivity? The statute plainly requires a neutral analysis of the extent to which such exclusive arrangements advance or inhibit the "development of competition in local and national . . . markets,"

[45] Notice at ¶ 35.

investment in "new satellite cable programming," and "diversity of [cable] programming."[46]

Paragraph 36. Paragraph 36 suggests that the Commission should presume that exclusive contracts are justified for new program services. Based on this presumption, the Notice proposes to allow exclusivity for new services for a period of up to two years to "facilitate the launch of the new service." Yet the Commission's premise here is untenable, and its proposal for an automatic two-year waiver is both unwarranted and self-defeating.

Above all, a new programming service needs to build an audience. To do so, it must be seen by as many cable customers as possible. That ordinarily would militate in favor of distributing the service through as many outlets as possible. There may be instances when a new programming service will want to grant exclusivity in return for a cable operator's pledge to provide, for example, favorable channel position. Such an agreement might possibly be in the public interest if it were of limited duration.

But we believe that exclusivity agreements far more often flow from the raw market power of huge vertically integrated MSOs. Those MSOs can demand exclusivity in return for access to their captive, mostly monopoly markets. If the Commission adopts a presumption in favor of exclusivity, that presumption will

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[46] § 628(c)(4)(A)-(E).

greatly reinforce the raw market power of these entities that Congress sought to control.

For example, consider the ASPN service in Mesa, which is owned by CableAmerica's competitor. ASPN has locked up the hottest programming in Arizona, Phoenix Suns games. How could the Commission realistically indulge a presumption that ASPN's exclusive contract to provide this high-demand programming only to its sister company, Dimension Cable, is pro-competitive? The proposition is virtually self-refuting.

There should be no presumption in favor of exclusivity. The public interest standards should be applied on a case-by-case basis. If a cable operator is denied new programming and perceives a strong customer demand, and in fact is fearful that its inability to offer that service will adversely affect its competitive position, the operator will file a complaint under section 628(d). In such a case, exclusivity plainly is not necessary to market the programming. Yet if the new programming is not much in demand, the cable operator will not file a complaint under section 628. The exclusive contract, which may in the latter instance help the programmer find a market for less popular programming, will continue undisturbed. Thus, in those cases in which a section 628 complaint is filed, a presumption that the exclusive contract is necessary to encourage the relevant programming service would be totally inappropriate.

Paragraphs 39-48. CableAmerica generally agrees with both the goals and the methods proposed for the enforcement scheme, as outlined in paragraphs 39-48. Yet CableAmerica offers several suggestions to improve and streamline the process.

First, in keeping with the expedition required under the Act,[47] a deadline should be established by which Commission staff should be required to hold the status conference contemplated in paragraph 41. CableAmerica proposes that such a status conference be scheduled not later than 45 days after a complaint under section 628 is filed, assuming Commission staff conclude that a prima facie case has been established.

Second, as discussed above,[48] the burden of proof -- at least in a section 628(c) proceeding -- should principally be placed on the respondent, the party that has entered into the discriminatory or exclusive contract, and which is therefore in a better position to present any justifications for its conduct. Thus, for example, in a proceeding challenging an exclusive contract, the programming vendor should have the burden of demonstrating the reasons why that contract may serve the public interest.[49]

Nevertheless, a section 628(c) complainant may still be required to make out a prima facie case that a vertically integrated satellite cable programming vendor has entered into a

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[47] See § 628(f)(1).

[48] See supra comments at ¶¶ 21-24.

[49] The analysis contained in CableAmerica's comments on ¶¶ 21-24 of the Notice, pertaining to the anti-discrimination rules, should generally apply to exclusive contract challenges as well.

programming contract that (1) discriminates against the complainant operator in price, terms, or conditions of sale or delivery [section 628(c)(2)(B)], or (2) affords a competing programming distributor exclusive rights to a programming service [section 628(c)(2)(D)]. In a section 628(b) proceeding, the operator would have to make out a prima facie case that such a vendor was engaging in unfair competition or unfair or deceptive acts or practices. And, unless the complainant alleged an anti-competitive purpose, the complainant would also have to establish a prima facie case that the practice prevented or significantly hindered the operator in providing programming to its customers. For these purposes, the complainant could present affidavits or documentary evidence demonstrating its good faith basis for believing that such contracts exist.

Third, CableAmerica disagrees with the discussion in paragraph 43 regarding the initial showing required of a complainant. Since, as discussed above, CableAmerica does not believe a complainant is required to show "harm" in a section 628(c) proceeding, CableAmerica also does not believe a complainant must make any prima facie showing on this issue.[50] For the same reasons, considerations such as whether other cable operators are offering the subject programming, or what the penetration level is for that programming, have no place in section 628(c) proceedings.

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[50] See supra comments at ¶¶ 10-11.

These considerations also are inappropriate because they would justify a vendor in discriminating against one programming distributor so long as it did not discriminate against all, or denying programming to some customers as long as it did not deny it to all. Nothing in the Act suggests that Congress wanted the Commission to tolerate some general level of vendor discrimination.

Fourth, we endorse the Commission's efforts to expedite the discovery process in section 628 proceedings. We suggest, moreover, that the Commission be guided by the recent amendments to the Federal Rules of Civil Procedure in various districts around the country to learn the most successful methods to achieve this goal.[51]

Fifth, we also agree with the proposal in paragraph 47 regarding issuance of protective orders. However, with respect to the suggestion to permit redaction of information not relevant to a complaint, we urge that the Commission provide for appeals challenging such redactions to the ALJ and/or Commission on a case-by-case basis.

Paragraph 49. The Cable Act prescribes certain remedies that the Commission may order following a section 628 adjudication. In addition to those enumerated in the Act, four others would be appropriate: (1) orders to void unjustified exclusive contracts, (2) civil penalties, (3) money damages,

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[51] See, for example, the local rules recently adopted by the District of Massachusetts.

where unfair, deceptive, or discriminatory acts or practices, or exclusive contracts, have injured a complainant, and (4) attorneys fees and costs.

The first of these additional remedies would complement the statutory authority of the Commission to establish prices, terms and conditions in programming contracts. The second is necessary to provide at least some disincentive for a programming vendor to ignore section 628, and is authorized under Title V of the Communications Act in any event.[52]

Finally, the third and fourth proposed remedies are necessary to remedy completely the effects of illegal acts or practices by programming distributors, and to persuade programming vendors to comply with the strictures of the Act completely. These remedies are also consistent with the relief available in tariff proceedings under the Communications Act.[53]

Respectfully submitted,

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January 25, 1993

[52] See 47 U.S.C. § 503.

[53] See 47 U.S.C. §§ 206-209.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter Of	)	
CABLEAMERICA CORPORATION,	)	
Complainant,	)	File No.
v.	)	
TIMES MIRROR CABLE TELEVISION,	)	
Defendant.	)	

COMPLAINT

Summary

This complaint is filed by CableAmerica Corporation ("CableAmerica") pursuant to section 628(d) of the Communications Act of 1934 ("Act"), as amended by section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), Pub. L. 102-385, 106 Stat. 1460, 1495 (1992) (to be codified at 47 U.S.C. § 548(d)).

In this complaint CableAmerica shows that its cable system in Mesa, Arizona has been denied access to sports programming on the Arizona Sports Programming Network ("ASPN") by Times Mirror Cable Television ("Times Mirror"). Times Mirror, in addition to owning ASPN, owns a cable system that competes directly with CableAmerica in Mesa. Times Mirror provides its own system in Mesa with access to ASPN. Times Mirror's refusal to grant CableAmerica access to ASPN in Mesa is unlawful under section 628 of the Act, and entitles CableAmerica to appropriate relief from the Commission.

To: The Commission:

The complainant CableAmerica Corporation shows that:

1. CableAmerica Corporation is a multichannel video programming distributor, as defined in § 2 of the Cable Act (to be codified at 47 U.S.C. § 531(12)), operating in a number of markets across the United States. Complainant's corporate address is 4250 E. Camelback Road, Suite 160K, Phoenix, Arizona 85018; telephone number (602) 952-0471.

2. Times Mirror Cable Television is a satellite cable programming vendor, as defined in § 19 of the Cable Act (to be codified at 47 U.S.C. § 628(i)(2)). Defendant's corporate address is P.O. Box 19398, 2381-2391 Morse Avenue, Irvine, California 92714; telephone number (714) 660-0500.

3. CableAmerica operates cable television systems in a number of markets across the United States, providing cable programming to approximately 54,000 subscribers nationwide. See Declaration of Christopher A. Dyrek ("Dyrek Decl.") at ¶ 2 (appended hereto as Exhibit A).

4. Times Mirror owns the Arizona Sports Programming Network ("ASPN"), which provides video transmissions to cable operators and to other video programming distributors. ASPN carries professional and other live sporting events featuring teams based in Arizona or otherwise of interest to Arizona residents. Id. at ¶ 6. These sporting events include a number of professional basketball games played by the Phoenix Suns during the 1992-1993 National Basketball Association ("NBA") season. Id. at ¶ 7; Attachment 1 thereto.

5. Direct competition between cable television systems operating in the same market is relatively rare. In fact, CableAmerica is one of the few cable companies that has entered local cable television markets on a competitive basis. Id. at ¶ 3. As a result, some CableAmerica systems operate in direct competition with other cable television systems. Id. at ¶¶ 3-4.

6. Since 1988, CableAmerica has operated a cable television system in Mesa, Arizona, which had 8,047 subscribers on December 31, 1992. Id. at ¶ 4. In this market, CableAmerica competes directly with another cable operator serving the same area, Dimension Cable. Id. Dimension Cable is owned by Times Mirror, which also owns ASPN. Id. at ¶¶ 5-6. In the Phoenix metropolitan area (which includes Mesa), Dimension Cable operates the fifth largest cable system in the country, with approximately 375,000 subscribers. Dimension Cable claims to have 40,000 to 50,000 subscribers in Mesa alone. Id. at ¶ 5.

7. Times Mirror has made its ASPN programming service available to Times Mirror's Dimension Cable system in Mesa, and ASPN programming is now being provided to the Dimension Cable subscribers there. Id. at ¶ 10.

8. Times Mirror has refused CableAmerica's request to purchase ASPN programming for its Mesa system, so CableAmerica has not been able to provide ASPN programming to its subscribers in Mesa. Id.[1]

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[1] Times Mirror sells ASPN programming to cable operators in other communities. For example, Times Mirror sells the ASPN service to TCI of Scottsdale, the cable television system in Scottsdale, Arizona. Dyrek Decl. at ¶ 10.

9. Phoenix Suns basketball games are extremely popular among residents of Arizona, and the Suns games that are broadcast and cablecast are widely viewed. See, e.g., id. at ¶ 9; Attachment 1 thereto. Although CableAmerica's programming line-up in Mesa includes one over-the-air broadcast channel which carries a number of Phoenix Suns games, CableAmerica cannot offer its subscribers the 20 Phoenix Suns games carried exclusively on ASPN. Id. at ¶¶ 7-8. Those games, moreover, cannot be obtained from any other satellite cable programming vendor. See, e.g., id. at ¶ 7; Attachment 1 thereto.

10. CableAmerica has repeatedly requested that Times Mirror sell the ASPN programming service to CableAmerica for distribution to CableAmerica's Mesa subscribers. Id. at ¶ 12. Times Mirror has refused to do so.

a. On October 8, 1992 the vice-president of CableAmerica, Christopher A. Dyrek, wrote to Times Mirror informing it that CableAmerica wanted to buy the ASPN programming. Mr. Dyrek stated that CableAmerica wanted to offer this programming before the end of 1992, and requested a prompt reply with information on pricing. Id.; Attachment 2 thereto.

b. Times Mirror did not substantively respond to the October 8 inquiry, so on November 5, 1992, Mr. Dyrek again requested by letter that CableAmerica be authorized to carry the ASPN programming. In this letter Mr. Dyrek cited the Cable Act, and in particular new section 628 of the Act. Id.; Attachment 3 thereto.